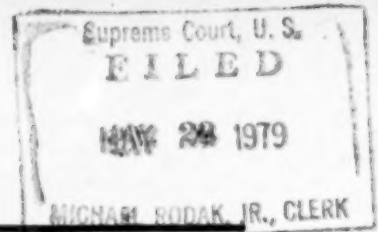


No. 78-1338



In the Supreme Court of the United States

OCTOBER TERM, 1978

COLEMAN-AMERICAN COMPANIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
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**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner seeks review of the court of appeals' decision (Pet. App. A1-A3) allowing disclosure of certain of petitioner's records. Petitioner's contention is that the documents were in the custody of a federal grand jury and the government failed to show a requisite need for the information under Fed. R. Crim. P. 6(e)(2)(C)(i).¹

¹Fed. R. Crim. P. 6(e)(2)(C)(i) reads:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

1. Petitioner operates correspondence and training schools, enrollment in which is financed in part through federally-insured student loans. In the past some of the insured student loans were made by a subsidiary of petitioner, and others were made by banks. In 1978 a federal grand jury empanelled in the Western District of Missouri investigated petitioner's student loan program; it subpoenaed loan records from petitioner and from one of the participating banks. Auditors from the Department of Health, Education, and Welfare (HEW) reviewed these records and prepared audit reports.

On June 22, 1978, HEW applied to the district court under Fed. R. Crim. P. 6(e)(2)(C)(i) for an order allowing disclosure of those subpoenaed documents and HEW audit reports in the custody of the grand jury, and for permission to use the knowledge of the HEW personnel acquired in the process of auditing the loan records. HEW stated that it needed these documents to defend itself in a related civil suit brought by petitioner's subsidiary and in other anticipated judicial proceedings.

The district court granted the application. It held that because HEW has independent authority to inspect petitioner's records under 20 U.S.C. 1082(a)(1) and 45 C.F.R. 177.62(d), the records were not "matters occurring before the grand jury" within the meaning of Rule 6(e). The court also held that HEW had shown a "particularized need" for the bank records, the HEW audit reports, and the HEW auditors' knowledge because of the judicial action pending against HEW.²

²Petitioner has neglected to reproduce the district court's opinions. We have reprinted them in an Appendix to this memorandum.

At petitioner's request, the district court certified its ruling to the court of appeals pursuant to 28 U.S.C. 1292(b) and stayed its order pending appeal. The court of appeals allowed petitioner's interlocutory appeal³ and affirmed the district "for the reasons set forth in [the district court's] orders" (Pet. App. A3).

Petitioner did not seek or obtain a stay of the court of appeals' mandate. The mandate issued on February 26, 1979, and all the documents that HEW sought have since been disclosed to it.

2. Because the documents have been disclosed, the questions presented in the petition are moot. See *County of Los Angeles v. Davis*, No. 77-1553 (Mar. 27, 1979), slip op. 6. The records and other sources of information previously placed before the grand jury have been reviewed by HEW, and there are no means to reverse or limit that result. No part of this litigation remains to be resolved. Moreover, because the dispute centered on the particular documents presented to the grand jury, the questions are unlikely to be replicated. See *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

³For this reason petitioner's allegation (Pet. 18-19) that there is a conflict among the circuits whether the district court's order could be appealed is immaterial. The disputed issue was resolved favorably to petitioner. If the Court were to grant the petition, however, we would argue that 28 U.S.C. 1292(b) does not authorize interlocutory appeals with respect to ongoing grand jury investigations. See *In re April 1977 Grand Jury Subpoenas (General Motors Corp.)*, 584 F. 2d 1366 (6th Cir. 1978) (en banc), cert. denied, No. 78-739 (Feb. 26, 1979). Moreover, because petitioner was not a "party" to the grand jury proceeding, it was not entitled to take an appeal. Compare *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911), with *Douglas Oil Co. v. Petrol Stops Northwest*, No. 77-1547 (Apr. 18, 1979) (Rehnquist, J., concurring).

Moreover, assuming *arguendo* that the controversy as a whole is not moot, the Court need not consider the question (Pet. 14-16) whether Rule 6(e) prohibits disclosure of documents in the custody of the grand jury merely because the grand jury is still sitting. The grand jury probe of this matter has ended. On April 24, 1979, an indictment was returned. A superseding indictment was returned on May 16, 1979. Thus, the question whether the lower courts properly ordered disclosure of materials while the grand jury was still in session is no longer presented.

In any event, the court of appeals' decision is correct. It properly held that, because HEW has an independent statutory authority to inspect petitioner's records, such inspection would not amount to "disclosure of matters occurring before the grand jury" within the meaning of Rule 6(e)(2)(C)(i). As the Second Circuit held in *United States v. Interstate Dress Carriers, Inc.*, 280 F. 2d 52, 54 (2d Cir. 1960):

*** [I]t is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

For that reason, neither *Interstate Dress Carriers* nor the decision below conflicts with *United States v. Procter & Gamble*, 356 U.S. 677 (1958), as petitioner contends (Pet. 11-12). *Procter & Gamble* held that

grand jury testimony was subject to Rule 6(e) because of the need to protect the secrecy of grand jury proceedings. *United States v. Procter & Gamble, supra.*, 356 U.S. at 682.⁴ Here, HEW has independent authority to review the documents pursuant to its regulatory function—a fact petitioner recognizes (Pet. 8)—and that authority was not extinguished because the grand jury reviewed the records pursuant to its own authority.

There are three answers to petitioner's contentions (Pet. 12-14) about the remaining documents—the bank records regarding student loans, HEW's audit reports, and the HEW auditors' knowledge of the foregoing documents. First, because HEW is a part of the government, it does not need special permission to see the materials. *In re Grand Jury*, 583 F. 2d 128 (5th Cir. 1978.). Second, because the documents were created outside the grand jury, disclosure should not be evaluated under the standards of Rule 6. The disclosure simply does not reveal testimony or the nature of the proceedings. Third, HEW's request met the standard of particularized need for disclosure. The latter contention involved essentially a factual finding by the lower courts, review of which is unwarranted. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi v. Immigration Director*, 385 U.S. 630, 635-636 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).⁵

⁴Like *Procter & Gamble, supra*, this Court's recent decision in *Douglas Oil Co.* involved transcripts of grand jury proceedings. It thus is inapplicable to the present case.

⁵Petitioner contends that it has proof of "abuse of the grand jury process" (Pet. 16). The district court found to the contrary (App., *infra*) and there is no reason for this Court to review that determination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

MAY 1979

APPENDIX A

No. 78-0444-CV-W-B

(IN CAMERA)

EXHIBIT C(1)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN THE MATTER OF:

THE AUGUST 29, 1975, TERM GRAND JURY INVESTIGATION
OF COLEMAN-AMERICAN COMPANIES, INC., ET AL.

ORDER ALLOWING DISCLOSURE

After a hearing and objections on the record, *in camera* before me in my chambers, on June 26, 1978, upon due notice to all interested parties, at which James Wyrsh, Bernard D. Craig, Jr., and Richard Shteamer appeared on behalf of James Coleman and Coleman-American Companies, Inc., and Ronald S. Reed, Jr., Richard H. Zehring and Robert E. Larsen appeared on behalf of the United States and the moving party herein, no one having appeared on behalf of the Home State Bank; and after being duly advised in the premises, the Court now, in response to the pending Application for Court Order Allowing Disclosure of Matters Occurring Before a Grand Jury, finds, concludes and orders as detailed hereunder.

The Court finds and concludes that:

1. The grand jury process, pursuant to which the records sought to be disclosed were obtained, was in no way abused or subverted and that the documents set out in the Application herein were obtained in

good faith by grand jury subpoenas duces tecum as part of an ongoing criminal investigation in the Western District of Missouri.

2. Pursuant to 20 U.S.C. 1082(a)(1) and 45 C.F.R. 177.62(d) the Office of Education of the Department of Health, Education and Welfare was and is authorized to independently, administratively examine and analyze the following documents belonging to Coleman-American Companies, Inc., and that therefore said documents, for the purposes to be used pursuant to the Application, are not ~~matters~~ occurring before the grand jury. ~~(United States of America v. Interstate Dress Carriers, Inc., 280 F. 2d 52 (2d Cir. 1960):~~

- a. Coleman-American student confirmation report (OE Form 1072);
- b. Coleman-American student academic records;
- c. Coleman-American monthly training reports;
- d. Coleman-American student grade sheets;
- e. Coleman-American interest bills and manifests;
- f. All the documents listed on Exhibit "A" attached to this Order.

3. There is a particularized need by the Office of Education of the Department of Health, Education and Welfare for the use of the documents and information hereinafter listed in subparagraphs 3(A) and 3(B) and for the use of the audit reports and personal knowledge of the federal agents hereinafter named in

subparagraph 3(C) in the pending judicial proceeding entitled *Edutronics Systems International, Inc. v. Department of Health, Education and Welfare*, Case No. 77-0916-CV-W-3, now pending in the United States District Court for the Western District of Missouri, and for use of same preliminarily to certain judicial proceedings which may or will arise out of administrative claims filed with the Department of Health, Education and Welfare by the Commerce Bank of Kansas City, the American Bank and Trust, the American National Bank of St. Joseph, Missouri, the Broadway National Bank, the Civic Plaza National Bank, the Douglas State Bank, the Westgate State Bank and the Home State Bank, all such administrative claims having been filed in connection with certain federally-insured student loans generated by or for or in connection with Coleman-American Companies, Inc., and its educational subsidiaries; that such use is in the interests of justice as authorized by the provisions of Rule 6(e)(2)(C)(i) of the Federal Rules of Criminal Procedure.

DOCUMENTS

- A. 1. Coleman-American student confirmation reports (OE Form 1072);
2. Coleman-American student academic records;
3. Coleman-American monthly training reports;
4. Coleman-American student grade sheets;
5. Coleman-American interest bills and manifests;

6. All documents listed on Exhibit "A" attached to this Order.
- B. Certain documents produced pursuant to grand jury subpoena issued July 22, 1976, to Home State Bank, with a return date of July 27, 1976, including:
 1. Documents in folder captioned "American National Bank—Miscellaneous Correspondence";
 2. A number of OE Forms No. 1151;
 3. Documents in the folder captioned "Coleman-American Correspondence";
 4. Documents in folder captioned "MISC. H.S.B. Correspondence on Accounts";
 5. Documents in folder captioned "Agreements".
- C. 1. The knowledge and audit reports of Van R. Phillips, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from May 24, 1976, to May 28, 1976, and from June 13, 1976, to June 18, 1976;
2. The knowledge and audit reports of Phyllis Speck, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from May 24, 1976, to May 28, 1976, and from June 13, 1976, to June 18, 1976;

3. The knowledge and audit reports of Fred I. Kinney, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from May 24, 1976, to May 28, 1976, from June 13, 1976, to June 18, 1976, and from June 20, 1976, to July 1, 1976;
4. The knowledge and audit reports of Gerald Marshall, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from May 24, 1976, to May 28, 1976; from June 13, 1976 to June 18, 1976, and from June 20, 1976 to July 1, 1976;
5. The knowledge and audit reports of Alvin Guttman, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from June 13, 1976, to June 18, 1976, and from June 20, 1976, to July 1, 1976.

It is, therefore, ORDERED that:

1. The Office of Education of the United States Department of Health, Education and Welfare is allowed disclosure of all the knowledge and reports of the federal agents hereinabove set out and all the documents so set out in paragraph 3 above for use in and preliminarily to the aforementioned judicial and administrative proceedings;
2. The existence of the proceedings before the grand jury pursuant to which these documents were obtained, and any ongoing investigations involving the same be

kept secret and confidential in conformity with the Federal Rules of Criminal Procedure by all agents and attorneys for the United States who have participated therein, and now may be engaged in representation of the Department of Health, Education and Welfare in the pending related case in Division 3.

3. All papers and records of this proceeding on this Application including the transcript of the hearing hereof shall be kept under seal, to be opened and examined only upon order of a Court having jurisdiction to do so.

Dated at Kansas City, Missouri, this 10th day of August, 1978

/s/ William H. Becker

WILLIAM H. BECKER
SENIOR UNITED STATES DISTRICT JUDGE

No. 78-0444-CV-W-B

(IN CAMERA)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN THE MATTER OF:

THE AUGUST 29, 1975, TERM GRAND JURY INVESTIGATION
OF COLEMAN-AMERICAN COMPANIES, INC., ET AL.

*RULING ON LETTER OBJECTIONS OF
COLEMAN-AMERICAN COMPANIES
SUBMITTED UNDER IN CAMERA*

The United States moved by application for an order allowing disclosure of matters affecting Coleman-American Companies, Inc., among others. Notice of the motion and an opportunity to object and be heard was given to all affected parties.

A hearing was held on the motion at which only Coleman-American Companies, Inc. appeared by counsel.

After the hearing it was announced that the motion (application) of the United States would be granted. The United States was requested to submit a formal order granting the motion on notice to Coleman-American Companies, Inc., which was permitted an opportunity to submit objections to the form of the order by letter. The objections and the letter response thereto have been considered.

The proposed order submitted by the United States is approved and the objections hereto overruled with the following exceptions:

- (1) A supplemental order will be entered containing the requirements of the amended order adopted in *Robert Hawthorne, Inc. v. Director of Internal Revenue*, (E.D. Pa. 1976) 406 F. Supp. 1098 except these of subsections (7) and (8).
- (2) The proposed "new paragraph 4" submitted on pages 3 and 4 of the objections be added as a paragraph of the Supplemental Order.

The order submitted by the United States has been signed and filed under seal.

The United States is requested to submit under *in camera*, on notice to ColemanAmerican Companies, Inc., the Supplemental Order described above.

All proceedings and ruling in this action have been conducted and made *in camera*. All findings have been made under seal.

/s/ William H. Becker

WILLIAM H. BECKER
SENIOR JUDGE

Kansas City, Missouri

Date: 5-14-78

EXHIBIT E
No. 78-0444-CV-W-B

(IN CAMERA)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN THE MATTER OF:

THE AUGUST 29, 1975, TERM GRAND JURY INVESTIGATION
OF COLEMAN-AMERICAN COMPANIES, INC., ET AL.

SUPPLEMENTAL ORDER
ALLOWING DISCLOSURE

And now on this 24th day of August, 1978, in consideration of this Court's Ruling On Letter Objections Of Coleman-American Companies Submitted Under In Camera, dated August 14, 1978, the following Supplemental Order to the Court's Order Allowing Disclosure dated August 10, 1978, is herewith entered.

It is ORDERED that:

1. Each employee of the United States Department of Health, Education & Welfare utilized by attorneys for the government to review the grand jury materials as permitted by this Order shall be sworn to uphold the secrecy of any grand jury matters that may come to his or her attention during the course of this investigation. The United States Attorney shall provide written instructions to all such employees, making clear the limited nature of the United States Department of Health, Education & Welfare access to grand jury material. Any grand jury materials delivered at any

time to the physical custody of the United States Department of Health, Education & Welfare or any of its employees shall be segregated from general HEW files, secured and marked, and the United States Attorney shall so certify to the Court.

In connection with the investigation of Coleman-American Companies, Inc., by this or any successor grand jury, the United States Attorney shall keep a "Rule 6(e) Docket," recording *inter alia* the following: (1) the docket number and date of the 6(e) Order governing the investigation, and the identity of the judge issuing it; (2) the general description of the investigation as set forth in the government's application for the 6(e) Order; (3) the identity of each investigative target; (4) the identity of all agency personnel with access to the material; (5) the identity of the relevant agency supervisory personnel; (6) the identity of the Assistant United States Attorney(s) supervising the investigation; and (7) the date on which the use of such grand jury materials as described in paragraph 3 of this Order was terminated.

When the Department of Health, Education & Welfare has completed the use of the grand jury materials as described in paragraph 3 of the Order Allowing Disclosure, the United States Attorney shall so certify to the Court. The certification shall include a statement that all matters theretofore entrusted to the Department of Health, Education & Welfare have been returned to the United States Attorney for appropriate disposition. Such disposition shall include return of all original papers, records, documents and the like to their respective owners, unless such papers,

etc., have been made the subject of a judicial order of impoundment or unless application for such an order is made simultaneously with the filing of the certification.

2. The Court is of the opinion that the Order Allowing Disclosure in this case granting the government disclosure involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation. This finding is made pursuant to 28 U.S.C. 1292(b) permitting interlocutory appeals. This Order permitting disclosure shall be stayed ten days from the date of the entry of this Order. If within said ten-day period Coleman-American makes application to the United States Court of Appeals for the Eighth Circuit for an order permitting an interlocutory appeal pursuant to Section 1292(b), Title 28, United States Code, this Order shall be automatically stayed pending disposition by the Court of Appeals of Coleman-American's application for an interlocutory appeal. In the event that the United States Court of Appeals for the Eighth Circuit grants Coleman-American's application for an interlocutory appeal, then the stay of this Court's Order permitting disclosure shall be extended until final disposition of Coleman-American's appeal. It is so

ORDERED.

William H. Becker
SENIOR JUDGE

KANSAS City Missouri

Dated: 8-24-78